RECENT CASES.

BANKRUPTCY — CONSTITUTIONAL LAW — INCRIMINATING QUESTIONS. — The Bankruptcy Act provides that no testimony given by the bankrupt on his examination shall be used against him in any criminal proceeding. *Held*, that this does not provide sufficient immunity from prosecution to take the case out of the Fifth Amendment. *In re Walsh*, 104 Fed. Rep. 518 (Dist. Ct., S. D.).

This holding is in accord with a number of recent decisions. *In re Scott*, 95 Fed. Rep. 816; *In re Rosser*, 96 Fed. Rep. 305. The opposite result has, however, been reached in one case, which seems inadequately considered. *Mackel* v. *Rochester*, 102 Fed. Rep. 314. It may be doubted, perhaps, if the Fifth Amendment was ever intended to give such extensive protection, but it is now perfectly settled that nothing short of absolute immunity from prosecution will take the place of the constitutional privilege. *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591. The clause of the Bankruptcy Act clearly does not meet this requirement, and hence the principal case is rightly decided. It is to be noted that in England, in the absence of constitutional protection, such questions can be asked, and the answers later used in criminal proceedings. *Regina* v. *Cross*, 7 Cox C. C. 226.

BANKRUPTCY — CONTINGENT CLAIMS — PROOF AGAINST GUARANTOR. — The bankrupts had guaranteed the payment of certain notes at maturity, which did not occur until after the filing of the petition in bankruptcy. *Held*, that the holder cannot prove against the bankrupt's estate, since his claim is not based upon a "fixed liability absolutely owing at the time of the filing of the petition," as required by section 63 a (1) of the Bankruptcy Act of 1898. *In the matter of McCauley & Sons*, 2 N. B. N. Rep. 1085. See NOTES, 14 HARV. LAW REV. 372.

BANKRUPTCY — INSURANCE — PAYMENT OF PREMIUMS. — A, having a policy of insurance on his life, while solvent voluntarily assigned it to trustees for his wife and children. Several years later he became insolvent, but continued to pay the premiums until his death. *Held*, that no part of the payments are conveyances or transfers of property. *In re Harrison*, [1900] 2 Q. B. 710.

The English courts have uniformly held that a voluntary transfer of a policy of life insurance, made while the debtor was insolvent, may be set aside. *Taylor* v. *Coenen*, 1 Ch. D. 636. Clearly it should make no difference whether the property is actually handed over by the debtor, or only paid for by him. In either case property which should be used for the payment of his debts has inured to the benefit of a volunteer. The true solution of the life insurance cases is to apply the rule followed where the insolvent husband voluntarily expends money in the permanent improvement of his wife's land. There a charge upon the land is created for the benefit of his creditors. *Humphrey* v. *Spencer*, 36 W. Va., 11, 18; *Seasongood* v. *Ware*, 104 Ala. 212; *Isham* v. *Schaffer*, 60 Barb. 317. So here money of the husband has been diverted from the payment of his debts to preserve the property of the wife. To the extent that this property has been thus benefited in fraud of the creditors it should be charged in their favor. The payments of premiums by the insolvent debtor are for all practical purposes gifts to the beneficiary. *Merchants', etc. Co.* v. *Borland*, 53 N. J. Eq. 282. The decision in *Central Bank* v. *Hume*, 128 U. S. 195, in accord with the principal case, is criticised in 25 AM. LAW REV. 185.

BANKRUPTCY — INVOLUNTARY BANKRUPTCY — COMPUTING NUMBER OF CREDITORS. — A general assignment for their benefit was assented to by all the creditors of the bankrupt save one, who filed a petition in involuntary bankruptcy. The Bankruptcy Act, 1898, § 59 b, allows one creditor to file a petition where all the creditors are not over twelve in number. *Held*, that the assenting creditors should be excluded in computing the number of creditors under this clause. *In re Miner*, 104 Fed. Rep. 520 (Dist. Ct., Mass.).

The Bankruptcy Act, § 1 (9), defines a creditor as one who has a provable claim against the bankrupt. While a creditor who assents to a general assignment is estopped to join in the petition, *In re Williams*, Fed. Cas. No. 17706, he may yet prove his

claim. *In re Troth*, 1 Fed. Rep. 405. Accordingly he seems to come squarely within the terms of the definition, and should be counted as a creditor under § 59 b. The reverse is true of a preferred creditor who is not allowed to prove his claim, *In re Currier*, Fed. Cas. 3492, and the decisions as to such creditors are not therefore in point. Nor is a general assignment in itself objectionable. *Mayer* v. *Hellman*, 91 U. S. 496. While it is made an act of bankruptcy, *West Co.* v. *Lea*, 174 U. S. 590, there seems to be no reason why it should not be resorted to where a sufficient number of creditors desire it. The present decision is opposed to the spirit of the Act, and to business convenience in compelling a large number of creditors to submit to one, or be at the expense of buying him off.

BILLS AND NOTES — COLLATERAL SECURITY — POWER OF SALE. — A promissory note was pledged as collateral to another note with power, on non-payment of the principal note, to sell without notice. The creditor for four years after the maturity of the principal note received payments on it, without realizing on the collateral, until only a small sum remained due. *Held*, that he had no right thereafter to sell the collateral without notice to the pledgor to redeem, and that the purchaser from him could not recover against the accommodation indorser of the collateral note. *Moses* v. *Grainger*, 58 S. W. Rep. 1067 (Tenn., Sup. Ct.).

The ordinary rule is that negotiable paper held as collateral security cannot be sold by the pledgee, but can only be collected at maturity. *Wheeler* v. *Newbould*, 16 N. Y. 392; *Joliet Iron Co.* v. *Scioto Brick Co.*, 82 Ill. 548. Stipulations, however, in the contract, allowing the pledgee to sell on default, with or without notice to the pledgor, are valid. *Nelson* v. *Eaton*, 26 N. Y. 410 (*semble*). It is difficult to see, then, why such a provision should have been declared ineffectual in the principal case, merely because the four years' indulgence had given the impression that the collateral would not be sold. Since at the time of the sale the collateral note must have been overdue, the purchaser would, of course, get only the rights which the pledgee had, that is, the right to enforce it against the accommodation indorser to the amount still due on the principal obligation. The amount realized by the sale would go in extinguishment of this obligation and the pledgor would not be injured in the least. The decision, therefore, nullifies the power of sale without any satisfactory reason.

CONFLICT OF LAWS — BILLS AND NOTES — GARNISHMENT. — The defendant, a resident of New York and the payee of a note executed in Vermont, transferred the note in New York, no notice of the transfer being given to the Vermont maker. *Held*, that the plaintiff, who was a resident of Vermont and a creditor of the defendant, could garnish the maker under a Vermont statute allowing the attachment of negotiable paper by trustee process as the property of the transferor at any time before notice of transfer is given to the maker. *Hawley* v. *Hurd*, 47 Atl. Rep. 401 (Vt.).

The doctrine that a debt can be garnished at the domicile of the debtor without having jurisdiction over the creditor is, though on principle unsound, supported by the weight of authority. *Chicago, etc. R. Co.* v. *Sturm*, 174 U. S. 710; 13 HARV. LAW REV. 596. The present case however is, it is believed, a misapplication of this doctrine. No notice of transfer being necessary by the law of New York, the transferee acquired an unimpeachable title to the note, which should be recognized everywhere, since, on the question of title, the law of the place of transfer, rather than the law of the place where the note is made, should govern. *Alcock* v. *Smith*, [1892] 1 Ch. 238; *Clark* v. *Connecticut Peat Co.*, 35 Conn. 303. The present case, therefore, not only allows the garnishment of a debt without having control of the creditor, but allows it in a case where the defendant had ceased to be the owner of the debt according to the principles of conflict of laws. For the contrary and better view, see *Clark* v. *Connecticut Peat Co.*, *supra*.

CONSTITUTIONAL LAW — POLICE POWER — PHARMACY ACT. — A statute in Illinois made it unlawful for any person not a registered pharmacist to compound or sell any drugs or medicines. *Held*, that in so far as this act imposes a restriction upon the sale of patent or proprietary medicines it is unconstitutional and void. *Noel* v. *The People*, 58 N. E. Rep. 616 (Ill.). See NOTES, 14 HARV. LAW REV. 382.

CONTRACTS — ASSUMPTION OF MORTGAGE DEBT — RIGHT OF MORTGAGEE TO SUE. — A executed a mortgage to B, the plaintiff, upon certain land which he later conveyed to C, who did not assume payment of the mortgage debt. C conveyed the land to D, the defendant, who assumed payment. *Held*, that B can recover the mortgage debt from D. *Cobb* v. *Fishel*, 62 Pac. Rep. 625 (Colo., C. A.).

Held, that B cannot recover the mortgage debt from D. *Eakum* v. *Shultz*, 47 Atl. Rep. 274 (N. J., Ch.).

In each of these jurisdictions, the general rule prevails that the mortgagee can recover when the intervening parties have assumed payment. *Starbird* v. *Cranston*, 24 Colo. 20; *Klapworth* v. *Dressler*, 13 N. J. Eq. 62. There are, however, two distinct theories on which this rule is based. One rests upon an equitable doctrine that the grantee's promise is an asset of his grantor which could be reached by the mortgagee, the grantor's creditor, through trustee process. *Crowell* v. *Hospital of St. Barnabas*, 27 N. J. Eq. 650. According to this theory, the principal case in New Jersey is correctly decided, since C, the defendant's grantor, owed nothing to the plaintiff. The other decisions rest upon the general doctrine that the beneficiary may sue. *Starbird* v. *Cranston*, *supra*; *Lawrence* v. *Fox*, 20 N. Y. 268. In New York, however, where this doctrine arose, the courts have not allowed the mortgagee, situated as in the principal case, to recover. *Vrooman* v. *Turner*, 69 N. Y. 280. Moreover, the practice of allowing beneficiaries to sue is unsound on common law principles. *Price* v. *Easton*, 4 B. & Ad. 433. The equitable doctrine in these cases is therefore clearly correct.

CONTRACTS — CONSTRUCTION — INDEFINITENESS OF PRICE. — A agreed in writing to furnish B news for publication during a period of one year, and B agreed to accept the news and pay for it a sum not exceeding three hundred dollars per week. After part performance of the contract, B refused to go on. *Held*, that the terms as to the price are so indefinite that no substantial damages can be recovered for the refusal to receive the news. *United Press* v. *New York Press Co.*, 164 N. Y. 406; 58 N. E. Rep. 527.

It is generally held that where a contract of sale is within the Statute of Frauds a clear statement of the price is an essential in the written memorandum. *Elmore* v. *Kingscote*, 5 B. & C. 583; *Stone* v. *Browning*, 68 N. Y. 598. The Statute of Frauds appears to have no application to the principal case, however, on account of the acceptance and receipt by the defendant of part of the subject matter. N. Y. REV. ST. 1343. Accordingly the inevitable result of the decision is that wherever an executory contract is silent as to the price to be paid the plaintiff during its term, it possesses no binding force. This is a harsh conclusion, and the fairer way is to construe such a contract as an agreement to pay what the goods or services are worth. *Woodly* v. *McLaine*, 10 Bing. 482. Moreover, by a fair interpretation of the writing, it was agreed to pay the regular price for the news, up to $300 per week, and this gives a clear basis for computing the price, so that in no reasonable sense can the price be called indefinite.

CONTRACTS — DAMAGES — DEFECTIVE CONSTRUCTION. — The defendant, in building a bridge for the plaintiff under a written contract, constructed one of the piers less securely than was called for by the specifications. The plaintiff in ignorance of this defect paid the contract price. The bridge and pier were afterward destroyed by a freshet of such violence that it would have destroyed them if the pier had been constructed according to the contract. *Held*, that the plaintiff may recover the cost of rebuilding the pier according to the specifications. *Sullivan County* v. *Ruth*, 59 S. W. Rep. 138 (Tenn., Sup. Ct.).

If the bridge and pier had remained uninjured, the damages would have been the difference between the value of the bridge as it was and as it should have been built. *Kidd* v. *McCormick*, 83 N. Y. 391. And if, as was apparently the case, the pier was so unsafe that it must necessarily have been rebuilt, the difference would have been the cost of rebuilding the pier. The intervention of the freshet could not increase the damages, since the defendant's breach of contract was not the cause of the destruction of the bridge. Nor could the destruction of the pier diminish the damages, which must be estimated with reference to the time when performance was due. *Brown* v. *Muller*, L. R. 7 Ex. 319. In questions of consequential damages, such as loss of prospective profits, events subsequent to the time for full performance may of course affect the damages. *White* v. *Miller*, 71 N. Y. 118, 133, 134. But where only direct damages are in question such subsequent events cannot alter the amount of an obligation which is already vested and determined. The decision is therefore entirely sound.

CONTRACTS — FRAUDULENT REPRESENTATIONS — NEGLIGENCE. — The defendant signed a written contract for the purchase of certain goods from the plaintiff, relying upon the fraudulent misrepresentations of the plaintiff's agent as to its con-

tents. *Held*, that his negligence in failing to read the contract barred his defence of fraud. *Dowagiac Mfg. Co.* v. *Schroeder*, 84 N. W. Rep. 14 (Wis.).

It is undoubtedly true as a general proposition of law that one who signs a contract is not allowed to set up his ignorance of its contents. *Dawson* v. *Burns*, 73 Ala. 111. But this rule should not hold where fraudulent representations as to its contents have been made, and the action is between the original parties. *Taylor* v. *Atchison*, 54 Ill. 196, 200. In such a case the question of negligence is immaterial, for the fraudulent party cannot set it up. *Albany, etc. Institution* v. *Burdick*, 87 N. Y. 40, 49; BIGELOW, FR. p. 524. The result in the principal case appears to have been due to a confusion with cases of promissory notes, where if the plaintiff is an innocent purchaser for value, and the defendant negligent, the fraud of the original payee is no defence. *Chapman* v. *Rose*, 56 N. Y. 137. The rule in such cases is due to the peculiar character of negotiable paper, and the position of the plaintiff, as a holder in due course, — facts which are entirely absent in the principal case. *Citizens' Nat. Bank* v. *Smith*, 55 N. H. 592.

CONTRACTS — NON-PERFORMANCE — EXCUSE. — *Held*, that a failure to ship goods within a reasonable time, as demanded by the terms of a contract, is not excused by the inability of the shipper to procure transportation owing to adverse discrimination against him. *Eppens, etc. Co.* v. *Littlejohn*, 164 N. Y. 187; 58 N. E. Rep. 19.

It is difficult to decide just what excuses of this nature are to be accepted, but the ruling of this case seems quite correct. Unavoidable delay caused by strikes has been held no excuse. *Castlegate Steamship Co.* v. *Dempsey*, [1892] 1 Q. B. 54. It is probably safest to limit the excuse of impossibility of performance to the three well-established classes — where it is caused by law, as in the case of the passage of a statute which prevents completion of the contract, *Baily* v. *De Crespigny*, L. R. 48 Q. B. 180; where goods have been destroyed, on which labor was to be performed, *Butterfield* v. *Byron*, 153 Mass. 517; and where sickness or death of the contracting party interferes, *Spalding* v. *Rosa*, 71 N. Y. 40. Beyond these limits, however, the courts properly hesitate to go, and as the loss must fall upon one of two innocent parties, it seems not unfair that there should be a strict application of the terms of the contract.

CORPORATIONS — INSOLVENT CORPORATION — DIRECTORS' LIABILITY FOR MINGLING MONEY. — A bank director, knowing that the bank was hopelessly insolvent, allowed deposits to be received and set apart. Later, without his fault, the cashier mingled these deposits with the funds of the bank. *Held*, that the director is personally liable to the depositors for losses so occasioned. *Cassidy* v. *Uhlmann*, 54 N. Y. App. Div. 205.

For a bank to receive deposits, with knowledge that it is insolvent, is universally held to be fraudulent. *St. Louis, etc. Ry. Co.* v. *Johnston*, 133 U. S. 566. Directors, who take part in such a transaction, are of course equally fraudulent, and should be held personally liable to the depositors, even though they direct that the deposits be kept separate. By this means it is true actual loss can be avoided, but since the depositor would not consent to such a proceeding if he knew the facts, the director has no right to impose the risk of its success on any one but himself. Sound public policy seems to require that directors be held to a strict accountability in such cases. The principal case is therefore to be commended, and is in accord with authority. *Miller* v. *Howard*, 95 Tenn. 407; *Delano* v. *Case*, 121 Ill. 247.

EVIDENCE — ADMISSIONS — DECLARATIONS BY MORTGAGEE. — *Held*, that the declarations of a mortgagee made prior to an assignment of the mortgage are not admissible against the assignee. *Merkle* v. *Beidleman*, 165 N. Y. 21; 58 N. E. 257.

Declarations of a former owner regarding his title to land are admissible against his assignee. *Woolway* v. *Rowe*, 1 A. & E. 114; *Pickering* v. *Reynolds*, 119 Mass. 111. This rule is based upon privity, or identity of interest, but such grounds seem unsound, since admissions are in their nature so purely *in personam* that their use should properly be restricted to suits concerning the maker or his personal representative. *Spargo* v. *Brown*, 9 B. & C. 935. In the case of personal property, the same broad rule formerly held, *Pocock* v. *Billing*, 9 Moore, 499, has been limited in later cases to the strict bounds suggested above. *Barough* v. *White*, 4 B. & C. 325; *Paige* v. *Cagwin*, 7 Hill, 361. There is no valid distinction between the two classes of cases, but since such admissions are at best dangerous and inconclusive evidence, the narrow rule is preferable. On principle, it would be expected that admissions by a mortgagee would be governed by the rule applied to realty, and the present case illustrates the extreme reluctance of the court to extend that rule beyond decided cases.

EVIDENCE — DYING DECLARATIONS — ABORTION. — *Held*, that, on an indictment for attempted abortion causing the death of the woman, her dying declarations are admissible in evidence. *State* v. *Meyer*, 47 Atl. Rep. 487 (N. J., C. A.).

The general rule is that dying declarations are admissible only in cases of homicide where the death of the declarant is the subject of the charge. *King* v. *Mead*, 2 B. & C. 605; *Regina* v. *Hind*, 8 Cox C. C. 300. Here the indictment was not for homicide, but for a statutory offence. Accordingly, under circumstances similar to those of the principal case, such evidence has been excluded. *People* v. *Davis*, 56 N. Y. 95. This decision, however, may have gone on the ground that, as proving the death of the child would have satisfied the indictment, the death of the mother was not necessarily in question. Moreover, there is authority for the contrary view. *Montgomery* v. *State*, 80 Ind. 338. In another case the evidence was excluded, but it is not clear whether the death was the subject of investigation. *State* v. *Harper*, 35 Ohio St. 78. By the strict doctrine this exception to the hearsay rule is given definite limits, but the reasons for the exception, — the desirability of securing conviction, and the special difficulty, in many cases, of procuring evidence, — seem to apply strongly to cases of this sort. Accordingly the evidence is admitted by statute in Massachusetts and New York. MASS. PUB. ST., 1889, c. 207, § 9; N. Y. ST. AT LARGE, 1875, c. 352. The principal decision, therefore, though doubtful historically, seems justifiable on practical grounds.

EVIDENCE — HEARSAY — OPINION IN PUBLIC DOCUMENT. — *Held*, that a certificate, made under the Army Rules, stating that the respondent had been admitted to an army hospital suffering from a certain disease, was admissible in evidence as a public document to prove that the respondent had committed adultery. *Gleen* v. *Gleen*, 17 Times L. Rep. 62 (P. D.).

The document in the principal case, being a record made by a public officer, in the discharge of his duties, of a transaction occurring in the course of these duties, was undoubtedly admissible as a public document, if there was no other objection to the matter therein stated than that it was hearsay. *Evanston* v. *Gunn*, 99 U. S. 660; *Sturba* v. *Freccia*, 5 App. Cas. 623. It seems, however, that the statement as to the nature of the respondent's illness might well be regarded not as a statement of fact, but merely as a statement of the opinion of the medical examiner; and on this view the document was clearly inadmissible, since opinion cannot be proved by hearsay. *Wright* v. *Tatham*, 5 Cl. & F. 670; *Hine's Appeal*, 68 Conn. 551, 557. The mere fact that the opinion is stated in a document otherwise competent could make no difference, just as not everything said by a competent witness is admissible. See THAYER, CAS. ON EV. 2d ed. 440, n. 2.

INSURANCE — ADMIRALTY — GENERAL AVERAGE. — The plaintiff, owner of a ship and of the cargo thereon, insured the cargo against any general average loss due to perils of the sea. Such a loss having occurred to the ship, *held*, that the insurance company is liable on the policy, although since both ship and cargo belonged to one owner there could be no contribution in fact. *Montgomery* v. *Indemnify, etc. Insurance Co.*, 17 Times L. Rep. 59 (Q. B. D.).

The principal case presents the first English decision upon this point, although there are earlier *dicta* each way. *Oppenheim* v. *Fry*, 3 B. & S. 873, 884, *accord*; *The Brigella*, [1893] P. 189, *contra*. It is well settled in the United States that a general average loss depends upon the nature of the loss, and not upon the fact that there are other contributing interests such as freight and cargo. *Potter* v. *Ocean Insurance Co.*, 3 Sumn. 27, 39. Thus there may be a general average loss to a vessel in ballast. *Greely* v. *Tremont Insurance Co.*, 9 Cush. 415, 418. Everywhere, moreover, freight and ship contribute separately, although both belong to one person. LOWND. AV. 4th ed. 308, 310. Where the insured owns both ship and cargo, he is, as owner of one, bound to contribute towards a general average loss to the other; and having the contribution in his own hands, his recovery from the underwriter of the property sacrificed is to this extent reduced. *Potter* v. *Providence, etc. Insurance Co.*, 4 Mason, 298. As the owner under these circumstances is virtually compelled to contribute towards the loss, the principal case seems right in sustaining an insurance against such liability.

PERSONS — HUSBAND AND WIFE — ESTATES BY ENTIRETIES. — *Held*, that independently of modern legislation, estates by entireties, not being suited to the conditions in Nebraska, are no part of the common law of that State. *Kerner* v. *McDonald*, 84 N. W. Rep. 92 (Neb.).

It is held in several jurisdictions that estates by entireties, though not expressly referred to in any statute, are impliedly abolished by the modern married women's property acts. *Appeal of Robinson*, 88 Me. 17. But this operation of the statutes in question is usually restricted to property conveyed after the passage of the acts. *Thornley* v. *Thornley*, [1893] 2 Ch. 229. On the other hand many jurisdictions hold that estates by entireties remain unless expressly abolished. *In Re Appeal of Lewis*, 85 Mich. 340. But the relations of husband and wife to such an estate are usually held to be altered in greater or less degree. *Hiles* v. *Fisher*, 144 N. Y. 306. The opinion in the principal case, though professing to disregard the modern statutes, seems on analysis to rest on the change in the general attitude of the law toward the marriage relation, a change brought about in part directly by legislation and in part by the influence of this legislation on the minds of the courts. The reasoning is not therefore entirely satisfactory, but the result is unobjectionable.

PERSONS — RIGHT TO DOWER — ANTENUPTIAL CONVEYANCE. — A widower, before a second marriage and without the knowledge of his intended wife, conveyed a portion of his land to three sons by a former marriage. *Held*, that his second wife is entitled to dower in the land. *Ward* v. *Ward*, 57 N. E. Rep. 1095 (Ohio). See NOTES, p. 452.

PROPERTY — COVENANT AGAINST INCUMBRANCES — ESTOPPEL. — Defendant granted land by a deed, containing a covenant against incumbrances, but under circumstances giving him an equitable defence to actions on the covenant by his grantee. The latter conveyed to the plaintiff without notice of the equity. *Held*, that the defendant is estopped to set up his equity against the plaintiff in a suit on the covenant. *Randall* v. *Macbeth*, 84 N. W. Rep. 119 (Minn.).

Although by the general American rule the breach of a covenant against incumbrances must occur at once, leaving only a *chose in action*, yet, where a statute makes *choses in action* assignable, the right of action is held to accompany the land, and the assignee is allowed to sue. *Hall* v. *Paine*, 14 Ohio St. 417. See 13 HARV. LAW REV. 608. The court bases the plaintiff's right to sue in the principal case on such a statute, but refuses to apply to these facts the settled rule that such an assignee takes subject to defences good against his assignor, *Way* v. *Colyer*, 54 Minn. 14, and holds that the covenantor must in justice be estopped to set up such defences against the plaintiff. The latter is thereby placed in the same position as the innocent holder of a promissory note. *Peacock* v. *Rhodes*, 2 Doug. 632. The desirable result of allowing the owner of the land for whose benefit the covenant is made to get the full advantage of it is thus reached, but the case is indefensible on principle.

PROPERTY — DEEDS — DELIVERY. — X deeded property to his wife to whom he was indebted and sent the deed by his attorney to be recorded. It was properly recorded and returned to the attorney, and thereupon it was given to the grantee, who had no previous knowledge of the transaction. Meantime the defendant had attached the land. *Held*, that there was no valid delivery until the grantee received the deed, and that therefore the defendant's attachment was good against her. *Knox* v. *Clark*, 62 Pac. Rep. 334 (Colo.). See NOTES, p. 456.

PROPERTY — EASEMENTS — IMPLIED GRANT. — Two adjoining lots of land, whose boundary bisected a dwelling-house, were simultaneously conveyed by the common owner, the one lot to the plaintiff and the other to the defendant's grantor. *Held*, that the plaintiff has no implied easement in that part of the house on the defendant's lot. *Whyte* v. *The Builders' League of New York*, 164 N. Y. 429; 58 N. E. 517.

In the conveyance of part of a lot of land, it is generally held that there is an implied grant of all reasonably necessary, continuous, and apparent quasi-easements over the land retained by the grantor. *Lampman* v. *Milks*, 21 N. Y. 505. See 14 HARV. LAW REV. 232. Where there are simultaneous conveyances of two adjoining lots by one grantor to two separate grantees, the same rule is applied as to the rights of each grantee over the land of the other. *Larsen* v. *Peterson*, 53 N. J. Eq. 88; *Cannon* v. *Boyd*, 73 Pa. St. 179. Such a transaction amounts to a voluntary partition, each party being virtually both grantor and grantee, and the argument that an easement is a derogation from the grant is therefore inapplicable. In the principal case, the mutual rights of user of the adjoining halves of the house seem clearly to be such apparent and continuous quasi-easements as should pass under the general rule. The result is therefore unfortunate, and contrary to the weight of authority.

QUASI-CONTRACTS — MISTAKE OF LAW — RECOVERY OF MONEY. — *Held*, that the plaintiff can recover premiums paid on a void insurance policy although the money was paid under a mistake of law. *Metropolitan Life Ins. Co.* v. *Blesch*, 58 S. W. Rep. 436 (Ky.).

The earlier decisions do not distinguish between mistakes of law and mistakes of fact in such cases, and in some recovery was allowed where the mistake seems to have been one of law. *Bonnel* v. *Fouke*, 2 Sid. 4; *Jaques* v. *Golightly*, 2 W. Bl. 1073. The modern rule is intimated for the first time in the remark by Buller, J., "If the law was mistaken, the rule applies, that *ignorantia juris non excusat*." *Lowry* v. *Bourdieu*, 2 Doug. 467 (1780). This remained unnoticed until adopted by Lord Ellenborough in 1802. *Bilbie* v. *Lumley*, 2 East, 469. In spite of the protest by Chambre, J., *Brisbane* v. *Dacres*, 5 Taunt. 143 (1813), the rule has been generally adopted that money paid under a mistake of law cannot be recovered. KEENER, QUASI-CONTRS. 85. The modern rule is unsupported by principle, for the maxim applied by Buller, J., is of value only where a defendant tries to excuse a wrong, and cannot be interpreted that every one must know the law. *Queen* v. *Mayor of Tewkesbury*, L. R. 3 Q. B. 629. In view of the origin of the modern rule and the hardship frequently caused by it, a return to common law principles, as in the present case, seems not entirely unjustifiable.

QUASI-CONTRACTS — STATUTE OF FRAUDS — EVIDENCE. — *Held*, that an oral agreement for services not to be performed within one year, though unenforceable on account of the Statute of Frauds, nevertheless fixes the value of services rendered under it by the plaintiff, when he is discharged after part performance without fault on his part. *Spinney* v. *Hill*, 84 N. W. Rep. 116 (Minn.).

It is well settled that where the defendant refuses to carry out an express oral contract coming within the Statute of Frauds, the plaintiff is entitled to recover in quasi-contract for the value of services rendered. *Wonsettler* v. *Lee*, 40 Kan. 367. Whether in such an action the express contract shall be admitted in evidence on the question of the actual value of the services, is a point on which there is a conflict of authority. Some courts consider it a violation of the statute to allow the amount of recovery to be influenced in any way by the express contract. *Fuller* v. *Reed*, 38 Cal. 99; *McElroy* v. *Ludlum*, 32 N. J. Eq. 828 (*semble*). But the contrary view, that the terms of the express contract are evidence on the question of value as admissions of the defendant, is, on principle, preferable. *Ham* v. *Goodrich*, 37 N. H. 185. There is, however, no authority or principle in support of the doctrine of the present case that the plaintiff has a right to recover at the rate fixed by the oral agreement.

QUO WARRANTO — MUNICIPAL CORPORATIONS — ILLEGAL ORDINANCE — PARTIES. — *Held*, that in *quo warranto* proceedings to prevent the exercise of municipal powers in territory included within city limits by an alleged illegal ordinance, the city itself, and not its officers, must be made defendants. *State* v. *Fleming*, 59 S. W. Rep. 118 (Mo.).

QUO WARRANTO — POLICE COMMISSIONERS — QUESTIONS RAISED ON QUO WARRANTO. — A statute created a board of police commissioners for a certain city, with powers, *inter alia*, to appoint a chief and control the city police, the expenses of the board to be paid by the city. In proceedings in the nature of *quo warranto*, brought against the commissioners and their appointee, *held*, that the only question raised is the constitutionality of the board's action in appointing a chief. *City of Newport* v. *Horton et al.*, 47 Atl. Rep. 312 (R. I.). See NOTES, p. 459.

RES JUDICATA — CRIMINAL AND CIVIL SUITS. — A statute authorized the court, in case of a conviction for maintaining a public nuisance, to issue a warrant for its abatement. *Held*, that an acquittal on such an indictment bars a subsequent action by the state to enjoin the continuance of the nuisance. *State ex rel. Remley, Att'y-Gen.* v. *Meek*, 84 N. W. Rep. 3 (Iowa).

The ordinary principles of *res judicata* do not apply here, for in the criminal suit proof beyond a reasonable doubt is required, while in the suit in equity it is enough if the proof is satisfactory to the court. *Upjohn* v. *Richland Township*, 46 Vt. 542. This difference is sufficient to prevent one suit from being conclusive in the other. *Riker* v. *Hooper*, 35 Vt. 461; *Martin* v. *Blattner*, 68 Ia. 286. The court, however, considers the case analogous to those where it is held that an action *in rem* for a forfeiture under the internal revenue laws is barred by a previous acquittal on an indictment. *Coffey* v. *U. S.*, 116 U. S. 436. This seems incorrect. Those cases depend on

the policy of the statute in question, and are expressly decided on the ground that the forfeiture is part of the penalty imposed for a crime. An injunction, on the other hand, is an ordinary civil remedy, and recourse to it ought not to be affected by the fact that, for the sake of convenience, it is sometimes allowed as the result of a criminal suit.

SALES — UNSPECIFIED GOODS — EQUITABLE LIEN. — X induced the plaintiffs, commission merchants in New York, to accept his drafts on the faith of his promise to consign them a certain quantity of goods which he intended shipping to New York. Apparently no particular goods were then appropriated. The intended shipments were subsequently made, but consigned to the defendant, who had notice of the previous agreement, and who sold the goods for less than the amount of the plaintiff's advances. *Held*, that the agreement between X and the plaintiffs will be enforced in equity by allowing the plaintiffs an equitable lien on the goods shipped, and that they can therefore recover the proceeds. *Triest* v. *Noval*, 32 N. Y. Misc. Rep. 386 (Sup. Ct., Spec. Term).

It is held in most jurisdictions that a mortgage of after-acquired property is good in equity against a subsequent attaching creditor or assignee in bankruptcy, or against a purchaser with notice. *Holroyd* v. *Marshall*, 10 H. L. Cas. 191; *Mitchell* v. *Winslow*, 2 Story, 630; *Wright* v. *Bircher*, 72 Mo. 179; *contra*, *Moody* v. *Wright*, 13 Met. 17. And though in most of the cases there was a formal mortgage deed, the principle obviously applies wherever there is an intention to create by contract a lien or charge on the property to be acquired for the purpose of securing a debt. *Brown* v. *Bateman*, L. R. 2 C. P. 272; *Mitchell* v. *Winslow*, *supra*, 644. In the principal case the same rule is extended to property which was apparently already acquired but not yet specified. Provided the subsequent specification clearly identifies the property as that originally intended, there seems no good reason for distinguishing such a case from those above cited. The decision is therefore a step in the right direction.

STATUTE OF LIMITATIONS — CERTIFICATE OF DEPOSIT — DEMAND. — The plaintiff deposited $500 with the defendant firm, and received a certificate of deposit, payable on return of the certificate properly indorsed. Nine years later the plaintiff demanded payment, and the defendant set up the Statute of Limitations. *Held*, that the statute did not begin to run until the demand. *Tobin* v. *McKinney*, 84 N. W. Rep. 228 (S. D.).

A certificate of deposit contains the elements of a promissory note and is ordinarily treated as such. *Bank of Orleans* v. *Merrill*, 2 Hill, 295; *Miller* v. *Austen*, 13 How. 218. Consequently courts have frequently held that a certificate, payable on its return, is like a demand note, due at its date, and that the statute therefore begins to run at once. *Brummagin* v. *Tallant*, 29 Cal. 503; *Mitchell* v. *Wilkins*, 37 Minn. 335. The established rule as to demand notes is, however, manifestly opposed to the terms of the instrument, and is indefensible on principle. *Cf. Downes* v. *Phœnix Bank*, 6 Hill, 297. Its evil results, moreover, as applied to bank notes have led to an exception in such cases. *Thurston* v. *Wolfborough Bank*, 18 N. H. 391. Business convenience and the clear intention of the parties no less require an exception in the case of certificates of deposit, and the weight of authority takes this position. *Bellows Falls Bank* v. *Rutland County Bank*, 40 Vt. 377; *Munger* v. *Albany City National Bank*, 85 N. Y. 580. The principal case, therefore, though contrary to the general rule that negotiable paper, payable on demand, is payable without demand, takes the better view.

SURETYSHIP — CONTRACTS — DAMAGES. — When a promissory note was made, the payee contracted to return it to the maker on the happening of a certain contingency. This he was unable to do, as he had in the mean time transferred the note to a purchaser for value without notice. *Held*, that the maker can recover, in damages from the payee, the collectible value of the note. *Lyle* v. *McCormick*, *etc. Co.*, 84 N. W. Rep. 18 (Wis.).

Since the payee in this case will ultimately be liable to the maker, the latter is practically in the position of a surety. The general rule is that a surety has no cause of action against his principal, until he himself has paid the claim. *Gibbs* v. *Mennard*, 6 Paige, 258. But this does not apply here, since the suit by the maker is for the breach of the payee's express contract to return the note. The only question, therefore, is as to the measure of damages. The great weight of authority holds in such cases that the plaintiff may recover the amount of the claim to which the defendant has exposed him. *Wicker* v. *Hoppock*, 6 Wall. 94; *Furnas* v. *Durgin*, 119

Mass. 500. The principal case points out that where the plaintiff is not responsible the more exact statement of the measure of damages is the collectible value of the claim. The result of the principal case is therefore correct, but a bill in equity to compel the defendant to indemnify the plaintiff against the debt would have reached the desirable result in a more satisfactory manner. *Wolmerhausen* v. *Gullick*, [1893] 2 Ch. 514.

SURETYSHIP — SUCCESSIVE TERMS OF OFFICE — LIABILITY OF SURETIES FOR SECOND TERM. — A school treasurer for two successive terms executed a new bond, with new sureties, for each term. In an action against the sureties on the second bond, for a defalcation appearing at the end of the second term, *held*, that *prima facie*, in case of such default, the sureties for the last bond are liable, and the burden is on them to show that the defalcation occurred during a prior term. *Board of Education* v. *Robinson*, 84 N. W. Rep. 105 (Minn.).

In accord with the principal case are several cases in which it is said that it will be presumed that the default did not occur in a former term. *Kelly* v. *State*, 25 Ohio St. 567; *Kagay* v. *Trustees*, 68 Ill. 75. There seems to be no reason for such a presumption, and it is not always made, for where there were no sureties for the second term a presumption has been made that the defalcation occurred during the first term, *Trustees* v. *Smith*, 88 Ill. 181. Again, in the absence of proof as to when the default took place, several groups of sureties have been held equally liable. *Phipsburg* v. *Dickinson*, 78 Me. 457. Clearly these cases cannot be supported on any theory of presumptions. The surety on a bond, however, is always liable unless he can show that the condition on which it was to be void has been performed. *Machiasport* v. *Small*, 77 Me. 109. In all these cases, therefore, the defendants were properly held, since they failed to show the absence of default during their respective terms.

TORTS — DECEIT — DAMAGES. — *Held*, that the measure of damages in an action for deceit is the difference between the real value of the property at the date of the sale and the price paid, with interest, together with remuneration for such outlays as may legitimately be attributed to the defendant's conduct. *Sigapes* v. *Porter*, 21 Sup. Ct. Rep. 34. See NOTES, p. 454.

TRUSTS — CHARITABLE BEQUEST — CY-PRES DOCTRINE. — The testator bequeathed money to his son for life, and in default of issue to a charitable institution. After the testator's death, and before the son's death without issue, the institution ceased to exist. *Held*, that the doctrine of *cy-pres* applies. *In re Solay*, 17 Times L. R. 118 (Ch. D.). See NOTES, p. 453.

REVIEWS.

BEVERLEY TOWN DOCUMENTS. Edited for the Selden Society by Arthur F. Leach. London: Bernard Quaritch. 1900. pp. lxii, 148.

This volume differs from the other publications of the Selden Society in that it contains few documents relating to legal history. The town records of Beverley are not of much importance for the study of legal procedure, because Beverley was a seignorial borough, and its lord, the Archbishop of York, had control of the municipal judiciary. The men of Beverley had a gild merchant and an elected body of twelve "Keepers," but not the right to hold their pleas in their own court or to elect their own bailiffs. The Keepers decided cases by arbitration, but the cognizance of pleas legally belonged to the court of the archbishop; and therefore we find no valuable plea rolls in the town archives. The Beverley Documents will, however, be cordially welcomed by students of economic and municipal history, for these muniments illustrate the development of borough government and the relations between the trade gilds and the